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Supreme Court, U.S.
FILED

98 863 NOV 25 1998

No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

LAFAYETTE PLACE ASSOCIATES,

PETITIONER,

v.

CITY OF BOSTON,

RESPONDENT.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a State court sharply alters settled common law, abrogating all private rights in a contract for the sale of land by a municipality, and transferring these rights to the municipality, do the Takings or Due Process Clauses limit the State court's ability to apply its new rule retroactively?

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PETITION FOR A WRIT OF CERTIORARI

Lafayette Place Associates ("LPA") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.[1]

OPINIONS BELOW

The denial of LPA's petition for rehearing to the Supreme Judicial Court of Massachusetts (App. A) is unreported. The opinion of the Supreme Judicial Court of Massachusetts (App. B) is reported at 427 Mass. 509 (1998). The memorandum of decision of the Superior Court of Massachusetts (App. C) is unreported.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its judgment on May 20, 1998 (App. B), and denied LPA's petition for rehearing on July 1, 1998. (App. A). On September 15, 1998, Justice Souter granted LPA's motion for an extension of time to file this petition to November 28, 1998. LPA invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. The petition for writ of certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).[2]

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[1] Pursuant to Supreme Court Rule 29.6, LPA states that it is not a corporation, but a Massachusetts limited partnership, the ultimate interest of which is owned by Mondev International, Ltd., a closely held Canadian corporation.

[2] LPA timely raised a federal question in its petition for rehearing to the Supreme Judicial Court of Massachusetts (App. A), its first opportunity to raise such issues.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, Section 1, which states in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case raises an important question in the evolving body of law protecting private property from State action: how far may a State court go in altering settled common law rules to defeat a private vested property rights in a contract with that State or its subdivision? At stake is the reasonable expectation of private citizens that they may rely on settled principles of common law in entering contracts with the State.

This case arises out of a 1978 contract between Lafayette Place Associates (LPA), and the City of Boston (City), and the Boston Redevelopment Authority (BRA), for LPA to redevelop a dilapidated area of downtown Boston. The contract also granted LPA an option in an adjoining City property, the Hayward Parcel, which LPA could exercise upon the completion of the first phase of the project which included a large mall. The department store to be built on that Parcel was vital to the financial success of the entire project.

By 1986, when LPA exercised its option for the Hayward Parcel, the City was unwilling to comply with the contract because the market value of the Parcel had appreciated dramatically. The City therefore stonewalled LPA's attempts to acquire the Parcel, while the BRA imposed regulatory road blocks.

Thwarted in its efforts to acquire the Parcel, LPA leased its interests in the mall and delegated the option to the Campeau Corporation (Campeau). Nonetheless, the City continued to block the acquisition until the acquisition period expired.

LPA ultimately filed suit in State court against the City and the BRA to recover its interest in the Parcel. After a 10-day trial, the jury returned verdicts of $9.6 million against the City in contract, and $6.4 million against the BRA in tort. On post trial motions, the judge granted the BRA judgment n.o.v. on the ground that it was immune from liability for intentional torts under State law but let stand the judgment against the City.

Both LPA and the City appealed the judge's rulings, and the Massachusetts Supreme Judicial Court (SJC) granted direct appellate review. The SJC unanimously affirmed the judgment n.o.v. for the BRA and, in a series of unprecedented and unanticipated holdings, reversed LPA's $9.6 million judgment against the City. The SJC's decision ran contrary to longstanding common law precedent in articulating new rules governing obligations of a party seeking to enforce a contract and in further holding that these new rules would be applied with special force to parties seeking to recover in contract against government.

LPA timely filed a petition for rehearing, arguing that the SJC had made profound errors in its interpretation of State law, that the decision effectively operated as a "taking," and that the decision was so arbitrary that it denied LPA due process rights. The SJC summarily denied LPA's petition.

LPA asks this Court to consider whether the SJC's application of unanticipated and unprecedented common law rules to LPA to effect a direct transfer of property from LPA to the City, constitutes a "taking" of LPA's property or violates LPA's due process rights.

A. The Tripartite Agreement

In 1978, LPA, a private partnership, entered into a contract (The Tripartite Agreement) with the City and the BRA to redevelop a distressed area of downtown Boston. The Tripartite Agreement provided for a two-stage development. LPA agreed to build a mall, parking garage and hotel as Phase I, and, upon its completion, have an option to purchase the Hayward Parcel, an adjoining lot, on which to construct Phase II, including an anchor department store.[3]

The Tripartite Agreement provided that the price for the Parcel was to be set by a formula amounting to one-half the value of the parcel in 1978 plus one-half the value to the parcel of any increase in value attributable to public improvements and the

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[3] Officials from LPA and Campeau testified that Phase II was crucial to the success of the project. Campeau's project coordinator testified, "If you didn't have [the Hayward Parcel], you didn't have a development. I can't say it any stronger."

construction of Phase I. Due to the rapid appreciation of property values in downtown Boston by 1986, when LPA exercised its option, the option price was only a small fraction of the Parcel's market value. The new City Administration was determined to avoid its contractual obligation to sell the property at a price it believed had become far too favorable to LPA.

B. City's Actions to Avoid the Contract

After LPA exercised its option, the City was obligated to obtain "forthwith" the appraisals needed to calculate the formula price and to set the final dimensions of the property.[4] LPA repeatedly, but unsuccessfully, pressed the City to fulfill these obligations.[5]

In the meantime, City agencies acted to thwart LPA's acquisition. The City Traffic Commissioner announced plans for a new road through the middle of the Parcel. The BRA also told LPA it would impose height restrictions on the Parcel of 125 to 155 feet, rather than the 300 to 330 feet agreed to only months earlier.

In mid-1987, the City and BRA pressured LPA to agree to a "drop dead" date of January 1, 1989, for the acquisition. LPA acceded to these demands in a

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[4] Construction of Phase I, and related public improvements, had slightly altered the dimensions of the Parcel.

[5] The contract did set forth a means by which disagreement over the appraised value of the property could be settled. However, the City never raised a dispute over the property's value; it simply refused to move forward by getting appraisals or setting the final boundaries.

show of good faith. A BRA official gloatingly described the new termination date as "totally in the City's favor and . . . permit[ing] the City to dispose of the Parcel to another . . . if LPA were unable to perform satisfactorily within the option period."

C. City Blocks LPA's Efforts to Sell Its Interests In Hayward Parcel to Campeau

By late 1987, LPA realized it could not successfully obtain the Hayward Parcel in the face of such staunch opposition from the City and agreed to sell its interests to Campeau, a large and highly successful developer. The City, however, sought to block the transfer to preclude LPA or Campeau from acquiring the Parcel at the option price. The BRA director told LPA that he would not approve the transfer "until I get a higher value for the [Parcel]. And I don't want you to take all that profit and run back to Canada with it." The Chairman of the City's Real Property Board similarly wrote to the Mayor,

> If, without negotiation, the BRA and the City allow the sale or transfer to occur, the new owner, Campeau (and also the prior owner) would realize an immediate monetary windfall due to the Option Agreement . . .

In January, 1988, the Real Property Board's official minutes bluntly noted,

> The Board expressed its desire . . . to receive the fair market value of the Hayward Parcel (abandoning the Tripartite formula) . . .

Once it became clear to LPA that it could neither purchase the property itself nor have the transfer to Campeau approved, LPA abandoned the sale and,

under far less favorable terms, leased the mall property to Campeau, while simultaneously delegating to Campeau its right to acquire the Parcel.

D. Campeau's Efforts to Purchase the Hayward Parcel

Although Campeau, which proposed a much larger project, repeatedly asked the City for an extension of the January 1, 1989 "drop dead" date, the City ignored Campeau's requests. By December 1988, when the City had neither extended the acquisition date nor approved the new project, Campeau wrote the Mayor offering to purchase the Parcel "immediately."

The City waited to respond until December 30, when the BRA Director wrote that, because the option would expire the next day, Campeau could thereafter purchase the Parcel for its "fair reuse value," noting that the expiration of the option "simply puts the question of the disposition of the Hayward Parcel in a current context."

LPA reacquired the mall and the rights to the Parcel when Campeau later filed for bankruptcy. Without the anchor department store on the Hayward Parcel, however, the mall failed and was foreclosed.

E. Prior Proceedings

In March, 1992, LPA filed suit against the City and the BRA. At trial in 1994, LPA alleged that the City and the BRA had breached their contractual obligations to LPA, and also that the BRA had wrongfully interfered with the LPA-Campeau sale agreement.

On October 21, 1994, the jury returned special verdicts,[6] including a verdict for breach of contract against both the City and the BRA, and a verdict for LPA on its interference claim against the BRA, awarding LPA $9.6 million against the City and $6.4 million against the BRA. The trial judge ruled that the contract verdict against the BRA could not stand because the jury had concluded in a special question that the BRA was not acting as the agent for the City.

In August, 1995, the judge granted the BRA's motion for judgment n.o.v. on the ground it was immune from liability for intentional tort under State law but denied the City's motion which argued, *inter alia*, that no valid contract existed for the Hayward Parcel, and that the City had not breached the contract. Both the City and LPA appealed, and the SJC granted direct appellate review.[7]

In direct repudiation of the jury's special verdict that LPA had fulfilled its contractual obligations, the SJC held that LPA could not recover against the City for breach of contract because it had failed, as a matter of law, to demonstrate that it was ready, willing, and able to perform its contractual obligations. The SJC further held, as a matter of law,

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[6] The jury returned eight special verdicts, concluding: that there was a valid contract; that LPA fulfilled its obligations under the contract; that both the City and BRA breached the contract; that the BRA did not act as the City's agent; and that the BRA intentionally interfered with LPA's contract with Campeau. The jury never reached the question whether LPA was excused from performance because of the City's actions, as it was instructed not to address that issue if it concluded, as it did, that LPA had fulfilled its own contractual obligations.

[7] The SJC upheld the judge's ruling that the BRA was immune under State law. LPA does not seek review of that decision.

that LPA had not offered sufficient evidence at trial that it was excused from performance by virtue of the City's manifest intent not to perform.

REASONS FOR GRANTING CERTIORARI

This petition asks this Court to determine for the first time what protections private citizens have from the retroactive application of State common law. This Court has placed limitations on the retroactive application of legislation, as well as limitations on the retroactive application of judge-made law in the criminal context. *See, e.g., Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998) (legislation with severe retroactive effects may violate due process and takings clauses); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) (negating retroactive repeal of State contractual obligations); *Bouie v. City of Columbia*, 378 U.S. 347 (1963) (striking down the retroactive application of judge-made law).

This Court has not yet applied these same principles to retroactive changes in civil common law, and has at times suggested that citizens have no federally protected rights in State common law. *See Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 88 n.32 (1978); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930). The reasons for treating the common law specially are well established.[8] The

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[8] Retroactive application of judge-made law in the criminal context may also be thought different than in the civil context because of the special protections afforded the citizen faced with criminal sanctions. *See Bouie*, 378 U.S. at 353-55. However, *Bouie* does make clear that the unfairness inherent in retroactive legislation is also present when courts announce new rules. *Cf. Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring) ("We should not indulge in the fiction that the law now announced has always been the law. . . .").

essence of the common law is its evolution over changing circumstances and times. This Court has been reluctant to place constitutional limitations on this important attribute of the common law tradition.

This case raises the question whether State courts are always free to alter settled relationships through the common law. When the State court has made a "sharp break" with common law precedent, and thereby takes property from a private citizen and gives it to the government, there is an important need to protect the private citizen from the State for at least two reasons.

First, where a common law decision makes a sharp break with precedent and its effects are effectively more "legislative," the constitutional protections against retroactive legislation should apply. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (whether "sharp break" with prior law is key component of decision whether to apply decisions retroactively). Indeed, the general rule that legislation does not apply retroactively arose from a concern that large scale shifts in law may defeat settled expectations. *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). Where that retroactive effect is too severe, the legislation may be deemed unconstitutional. *See Eastern Enterprises*, 118 S.Ct. at 2153. Analogously, where the retroactive effect of a change in common law is severe, similar constitutional protections should be afforded.

Second, where the State court's decision operates to take a private citizen's property and give it to the

government, constitutional scrutiny is warranted. Courts will more readily find "takings" where the property is taken for the government's own use "than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) ("total destruction by the Government of all value of these liens ['of which loss the Government was the direct, positive beneficiary'] has every possible element of a . . . 'taking'."). Similarly, under due process analysis, where the State is overseeing its own self-interest, heightened scrutiny of the State's actions are required. *See United States Trust*, 431 U.S. at 26 & n.25 (heightened scrutiny needed under the Contracts Clause where "State's self-interest is at stake"). In this case, both elements combine to warrant this Court's review.[9]

A. Does The Retroactive Application Of A Sharp Change In Common Law Operate As A Taking In This Case?

1. *The SJC's Opinion Constituted a Sharp Break with Prior Doctrine*

The SJC's opinion broke with prior precedent in three ways: (1) the SJC created additional obligations for parties seeking to recover in contract; (2) the SJC

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[9] The review requested by LPA has two inherent limiting principles. The first is that a sharp break with prior law would be required, and second, the government would have to be the direct beneficiary. State courts would likely be effective in self-policing where these principles are involved. Consequently, granting review here would neither lead this Court toward a generalized review of state court decisions nor flood the Court with petitions seeking this type of review.

concluded, as a matter of law, that LPA was not excused from performance even though prior law had established this as a question for the jury; and (3) the SJC applied its new rules with special force to LPA because it sought to recover against the government.

According to the SJC's opinion, LPA could not recover against the City for breach of contract absent a manifestation that it "is ready, able, and willing to perform *by setting a time and place for passing papers or making some other concrete offer of performance.*" *Lafayette Place Associates v. Boston Redevelopment Auth.*, 427 Mass. 509, 520 (1998) (emphasis added). For this reason, the SJC found Campeau's letter to the City offering to "complete the transaction and make payment immediately" insufficient. But Massachusetts law has never required such a formality.

The principal case relied on by the SJC for this prerequisite to recovery requires only "some offer of performance," *Leigh v. Rule*, 331 Mass. 664, 668 (1954), and the other cases relied on by the SJC are largely inapposite. While plaintiffs had set a time and place for performance in the other three cases the SJC cited, in none of them was being ready, willing, and able the critical issue, and none of them in any way set a *minimum standard*. *See LeBlanc v. Molloy*, 335 Mass. 636, 637-38 (1957) (whether plaintiffs had right to set the place for performance when not specified in contract and where defendants did not object to place chosen); *Fox of Boylston Street Ltd. Partnership v. Mayor of Boston*, 418 Mass. 816, 818 (1994) (statute of limitations); *Bucciero v. Drinkwater*, 13 Mass. App. Ct. 551, 553-56 (1982) (whether disagreement over payment of taxes rendered contract void).

Finally, the SJC relied on *Mayer v. Boston Metro. Airport, Inc.*, 355 Mass. 344, 350-52, 354-55 (1969), in which plaintiff's recovery was *denied* despite his notification that he would appear with the required consideration at the Registry of Deeds on a date certain. The case merely stands for the unrelated proposition that a plaintiff cannot recover where he manifests a refusal to accept performance on the contract terms. The date and time aspect of the offer was irrelevant. Consequently, the SJC's sole support for its new rule that a plaintiff must offer performance *at a certain time and place* is a 1954 decision requiring "some offer of performance," and a handful of inapposite cases in which the action now *required* of LPA had *incidentally* occurred.

The extent of the surprise in the SJC's holding is aptly demonstrated by the fact that the City, despite extensive briefing by highly skilled outside counsel, never made the argument relied on by the SJC. Indeed, in the course of its 79 pages of briefing the City never even cited a single case relied on by the SJC in its holding on lack of breach.[10] The City never argued on appeal that LPA or Campeau were not ready, willing, and able to perform,[11] but rather contended that LPA lost its rights by its transfer to Campeau, and that the City's undisputed failure to obtain appraisals and its statements of non-performance made in official proceedings did not amount to material breach.

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[10] The trial judge also detected no such rule in denying the City's judgment n.o.v.

[11] This highlights the SJC's action in ignoring its long-standing rule against reversing a lower court judgment on a ground neither raised below or on appeal. *See, e.g., Cacicio v. Secretary of Public Safety*, 422 Mass. 764, 769 n. 9 (1996).

Second, the SJC substantially raised the bar for submission to the jury on the question of whether LPA's further performance was excused by the City's repeated unwillingness to perform its contractual obligations. Where a party expresses a clear intention not to perform or where a party is in material breach, the plaintiff is excused from offering performance. *See Hastings Assoc., Inc. v. Local 369 Building Fund, Inc.*, 42 Mass. App. Ct. 162, 171 (1997). Whether such performance is excused is an issue of fact for the jury. *Ibid.* Here, however, the SJC concluded that LPA had introduced insufficient evidence to present the matter to the jury. It held this in spite of evidence, *inter alia*, that: the City repeatedly expressed its intent not to perform; made plans for a through road, which would have made building on the Parcel impossible; refused to complete the appraisals that it was required to obtain[12] or to define the final borders of the property; and sought to have the BRA coerce more money from LPA in order to approve the sale to Campeau. On this evidence, the jury easily could have found either that the City was in breach or had manifested a clear intent not to perform.[13]

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[12] The SJC faults LPA for not invoking arbitration procedures in the contract designed to resolve disputes over valuation. But, neither the City nor LPA objected to any appraisals of the property. Rather, LPA could not get the City to move forward by obtaining the property boundaries or getting the remaining appraisals. Since the arbitration procedures required the City's active participation by picking an appraiser, the jury could well have concluded LPA's invocation of those procedures would have been futile. *See Hastings Assoc.*, 42 Mass. App. Ct. at 171.

[13] Given the jury's consistent special findings against the City and for LPA, it likely would have found LPA excused from its obligations because of the City's actions, had that issue been put before it. LPA should at least have had the opportunity to have that question decided by the jury. *Hastings Assoc.*, 42 Mass App. Ct. at 171.

Third, the SJC held for the first time that it would hold private entities contracting with the government to a higher standard than when dealing with each other.[14]

> This is particularly true in a complex and heavily regulated transaction such as this one, where public entities and public and elected officials with changing policies and constituencies are involved, and the transaction spans many years. This is not to say that governments are absolved from performing contractual obligations, but where a government contract specifies procedures and methods a private party must be particularly assiduous to comply with them. *'Men must turn square corners when they deal with the Government.'*

Lafayette Place, 427 Mass. at 523-24 (emphasis added).

The SJC's sole authority for this remarkable holding was a decision of this Court reviewing Internal Revenue Service procedures. *See Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920). This holding directly reverses longstanding Massachusetts precedent. *See Minton Const. Corp. v. Commonwealth*, 397 Mass. 879, 880 (1986) (the State

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[14] The City asked at trial for an instruction wholly consistent with the law as it then stood:

> For the purposes of your deliberations, it makes no difference. . . that the City of Boston. . . is. . . a large municipal entity. The City is entitled to rely on its legal rights to the same extent as any individual person. . . All persons, including the City of Boston. . . , stand equal before the law and are to be dealt with as equals in a court of justice.

"will be held answerable 'exactly as though it were a private individual.'"); *Babcock Coal Co. v. Boston*, 303 Mass. 518, 521 (1939) (State contract rules apply "to municipalities equally with other buyers").

Thus, in its decision the SJC announced a surprise new rule, ignored its own established precedent regarding whether LPA's obligations were excused; and then reversed its own precedent *sua sponte* in holding LPA to a higher standard to recover against government.

2. *Because LPA Would Have Prevailed Under the SJC's Own Prior Interpretations of State Law, the Change in State Common Law Acted to Take LPA's Property*

Absent the retroactive application of these new common law doctrines, LPA would have retained its $9.6 million judgment because the Campeau letter met the "some offer of performance" standard stated in *Leigh v. Rule*.

It is quite clear that rights in a contract may be protected property under the Takings Clause. *See United States v. Security Ind. Bank*, 459 U.S. 70, 75 (1982). *See also Armstrong*, 364 U.S. at 48 (mechanic's liens are property under Takings Clause). Thus, the SJC's retroactive imposition of new rules acted as a direct transfer of the protected property rights of a private entity to the City.

Although it is well established that, when a State takes the property of A and gives it to B, a taking may have occurred, the Takings Clause applies most definitely, and with greatest force, where the State takes a private entity's property for itself. *See Penn Central*, 438 U.S. at 124; *Eastern Enterprises*, 118 S.Ct. at

2146 ("classic taking" occurs where "government directly appropriates private property for its own use"). Therefore, this Court should apply a Takings analysis to this case.

3. *A Sharp Unexpected Retroactive Change in Common Law Can Result in a Taking*

This case "fits but awkwardly into the analytic framework" of the Takings cases.[15] *Security Ind. Bank.*, 459 U.S. at 75. While the action about which LPA complains acted to transfer directly property from a private entity to the government, it cannot reasonably be argued that this is a direct physical seizure of property. Nor does this case fit comfortably into the line of regulatory taking cases because in those cases, "the governmental action affected some but not all of the 'bundle of rights' which constitute the 'property' in question." *Ibid.* It nonetheless seems appropriate to analyze this case in the Takings context since unfair and unjust State action had the effect[16] of transferring a private entity's property to the government. Such action is at the core of the Takings Clause protection. *See Armstrong*, 364 U.S. at 48-49.

"The question of what constitutes a 'taking'... has proved to be a problem of considerable difficulty." *Penn Central* 438 U.S. at 123. The purpose of the

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[15] The Fifth Amendment Takings Clause is applicable to the states through the Fourteenth Amendment and applies to actions of State courts. *See Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 232-34 (1897).

[16] A focus on the effect of the government action, from the perspective of the owner, is entirely appropriate under the Takings Clause. Moreover, the government actors need not have intended to take property. *See Hughes v. Washington*, 389 U.S. 290, 298 (1967)(Stewart, J. concurring).

Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. The inquiry into when "fairness and justice" require compensation eschews any "set formula"; rather, the determination is based on "ad hoc, factual investigation" into "the particular circumstances" of the case. *Penn Central*, 438 U.S. at 124. This Court has articulated three factors that "have 'particular significance': (1) 'the economic impact . . . on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment - backed expectations'; and (3) 'the character of the governmental action.'" *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

a. *Economic Impact*

This first *Connolly* factor weighs strongly in LPA's favor. Expert testimony put the value of the Parcel at approximately $16.4 million more than the option price, and the jury awarded LPA $9.6 million on its contract claim.

The degree of loss is also important. That is, where government takes a valuable attribute of property, but leaves property rights which are still valuable, a taking is less likely to be found. *See Penn Central*, 438 U.S. at 136-37. However, when government action takes all or nearly all the value of the property, a compensable taking will most often be found. *See Armstrong*, 364 U.S. at 48 (complete destruction of lien held a taking); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (law making coal mining commercially impracticable a taking where that was only valuable use). Here, the SJC's new rules rendered LPA's contractual rights completely worthless.

This Court has also considered whether the government action resulted in a reciprocal benefit to the claimant. This principle is commonly cited as a justification for zoning restrictions: while one's own right to use one's property exactly as one sees fit is curtailed, one also benefits from the restrictions on one's neighbors' right to use their property in a way which is noxious or damaging. *See Pennsylvania Coal*, 260 U.S. at 415 ("an average reciprocity of advantage"). But, LPA cannot be said to have gained anything from the SJC's new rules.

b. *Reasonable Investment - Backed Expectations*

LPA invested millions of its own, borrowed $75 million more, and spent many years in building Phase I of the project, all in justifiable reliance on the City's fulfillment of its contractual obligation to sell LPA the Parcel. *Cf. Bromfield v. Treasurer & Receiver General*, 390 Mass. 665, 669 (1983) ("The presumption exists that the Commonwealth will honor its obligations"). If that reliance turned out to be misplaced, LPA fully expected it could obtain appropriate relief in the courts of Massachusetts, that it would be treated fairly by those courts, and that settled principles of contract law would be applied to it even handedly - even if the defendant was the Commonwealth's largest city. Instead, LPA spent six years in litigation, only to have its hard-won jury verdict taken from it based on new law, with which LPA could not have known it had to comply.

LPA's reliance on this settled legal principle was reasonable and justified, for the retroactive application of law can constitute a taking, largely because of its unfair disruption of settled expectations. *See Eastern Enterprises*, 118 S.Ct. at 2151-52. "Retroactivity is generally disfavored in the law, in accordance with

'fundamental notions of justice' that have been recognized throughout history." *Id.* at 2151 (numerous authorities cited)(citations omitted).

Yet common law retroactive effects have generally been considered different: "Courts, in making ad hoc adjudications, regularly apply rules and doctrines not previously announced, to prior conduct of the parties." *National Labor Relations Bd. v. Guy F. Atkinson Co.*, 195 F.2d 141, 148 (9th Cir. 1952). Because common law rules are intended to evolve and retain flexibility to adjust to new facts, reliance on the absolute consistency of common law rules would be unreasonable. *See, e.g., Duke Power Co.*, 438 U.S. at 88 n. 32. But any problem raised by retroactive application has usually been considered tolerable as State common law is assumed to be relatively stable and its evolution gradual. Where the change is more substantial, however, common law evolution begins to act much like legislation. Even then, though, this Court might be reluctant to impose any constitutional limitation on common law rule-making. The State court, in the role of a neutral arbiter, is ordinarily assumed competent to know both when its rules should apply only prospectively, and when it is fair to apply them retroactively. *See Great Northern Ry. Co. v. Sunburst Co.*, 287 U.S. 358, 364 (1932).[17] Where, however, the State or a city is before

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[17] In fact, the SJC's decision appears to fail this Court's test for applying decisions retroactively:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision. . . must establish a new principle of law . . . . Second, . . . we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and

the State court and the court has announced an unanticipated new rule to benefit the State, absolute deference to that court's judgment is not necessarily appropriate. *See United States Trust Co.*, 431 U.S. at 26 & n.25 (1977) (heightened scrutiny required where "the State's self-interest is at stake").[18] This Court has, on occasion, recognized this principle in other contexts. *See Gelpcke v. Dubuque*, 1 Wall. 175 (1863) (refusing to give effect to recent State court decision interpreting the State constitution to invalidate municipal bonds where decision overruled prior consistent precedent and would have benefitted the municipality); *Hardin v. Jordan*, 140 U.S. 371, 386-87 (1891) (disregarding State court holding inconsistent with prior State common law and law of other states); *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 416, 432 (1853) (contracts with State authorities made under old interpretation of the State constitution, which binds this Court); *Hughes*, 389 U.S. at 296-97 (declining to give effect to State court decision based

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> effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application . . . .

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) (citations and quotations omitted). Here, the SJC decision established new law, *supra* at 12-16, its intended benefits would not be harmed by prospective application only, *infra* at 23-24, and the retroactive application worked a substantial hardship on LPA. *Supra* at 18-19. Consequently, under Supreme Court precedent, this decision should not be applied retroactively. Though the *Chevron* test has never been constitutionally mandated, something akin to the *Chevron* test might be constitutionally required, at least where the benefits of the new rule inure directly to the government at the expense of private litigants.

[18] Where it is both the State adjudicating and benefitting, such heightened scrutiny should equally apply. *See infra* at 25-28.

on State law which would have acted to transfer property from a citizen to the State: "To the extent that [the court's decision] constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate."); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-63 (1980) (disregarding State court decision that State statute created the property in question, in favor of "[t]he usual and general rule . . . that any interest . . . follows the principal," where decision resulted in "the exaction ... [of] a forced contribution to general governmental revenues..."). *Cf.* Epstein, *Takings* 96-104 (1985).

The SJC's sharp breaks with its own well settled common law precedent and its application of new legal principles in ways that directly benefitted the government, wholly disrupted LPA's reasonable expectations that it could enforce its contract according to established contract principles. Consequently the SJC's decision destroyed LPA's reasonable, investment-backed expectations.

c. *Character of Governmental Interference*

This factor ordinarily focuses on whether the governmental action can be characterized as a "physical invasion by government, [rather] than when interference arises from some public program "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. While the governmental action operated to take all of LPA's property rights, *see Armstrong*, 364 U.S. at 48 ("the Government for its own advantage destroyed the value"); *Webb's Fabulous Pharmacies*, 449 U.S. at 163 ("[The municipality] has not merely 'adjust[ed] the benefits and burdens of economic life to promote the common good.' Rather, the exaction

is a forced contribution to general governmental revenues...") (citation omitted). This case does not fall easily into place with the physical intrusion cases. There the government physically invaded tangible property, here the SJC decision directly transferred intangible property to the government. Consequently, while the Court should consider the government's taking of the property, it requires a further analysis.

In *Eastern Enterprises*, where the taking also involved intangible property, the plurality focused on fundamental fairness and concluded that while in principle a legislative solution to the problem (health benefits for retired coal miners) made sense, the way the program worked in singling out certain employers based on long past relationships, without any relation to the propriety of their conduct, commitments, or the injury caused, was fundamentally unfair.

Similarly, here, LPA does not contend that the SJC cannot revise contract law in order to more effectively resolve contract disputes. LPA objects only to the unfair retroactive application of this new law to it, especially where the retroactive application operates to benefit government. To the extent to which the SJC can be said to be "adjusting the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124, that purpose could be accomplished well enough by the *prospective* announcement of these new rules. The SJC's *retroactive* application of its new rules only serves to insulate the City from a judgment it would otherwise have had to pay.

As in *Eastern Enterprises*, the government action at issue here, while facially an attempt to set out new rules regulating commercial relations between citizens

and government, operated in an unnecessarily unfair way as applied to LPA. Indeed, the government's action here is even more unfair than in *Eastern Enterprises* because here the government took all the resulting benefits for itself. *See Armstrong*, 364 U.S. at 48 (extinguishment of intangible property for government's benefit a taking); *Webb's Fabulous Pharmacies*, 449 U.S. at 162-63 (government's appropriation of interest in fund ruled a taking).

The SJC's decision violates the principles inherent in all three factors of this Court's Taking analysis. This Court should therefore grant certiorari and conclude that the Takings Clause protects LPA's interests.

B. Does the Retroactive Application of State Common Law Here Violate LPA's Due Process Rights?

1. *The SJC's Decision Is Reviewable Under the Principles of Due Process*

The Fourteenth Amendment's proscription that no "State [shall] deprive any person of life, liberty, or property without due process of law" was intended to protect citizens against the arbitrary exercise of State sovereign power. *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819). The protection of the due process clause applies against all exercise of State power, whether legislative, executive, or judicial. *Scott v. McNeal*, 154 U.S. 34, 45 (1894). While State court decisions based on State law are generally immune from review in federal court, *see, e.g., Central Land Co. v. Laidley*, 159 U.S. 103, 112 (1895); *Remington Paper Co. v. Watson*, 173 U.S. 443, 451-52 (1899), where "judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those

fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights,'" such decisions do not evade review. *American Ry. Express v. Kentucky*, 273 U.S. 269, 273 (1927); *see also Reynolds v. Georgia*, 640 F.2d 702, 705 (5th Cir. 1981) (an arbitrary judgment of a state court may abridge the Constitution). The SJC decision amounted to such an arbitrary exercise of State power.

2. *The Court Should Review the SJC's Decision Under a Heightened Standard of Scrutiny*

Ordinarily, the exercise of power by State officials carries with it a strong presumption of constitutionality. Such deference to State judgment, whether legislative, executive, or judicial, is justified because the State necessarily allocates rights and liabilities among private individuals and, ordinarily, there is no reason to conclude that subtle bias existed among those State decision makers.

Where, however, State actors allocate rights and liabilities between private parties and the State itself, the reasons for deference to the State are not nearly as compelling. Indeed, this Court has recognized a need for a heightened degree of oversight of the State action where the State's own interest is at stake. *See United States Trust*, 431 U.S. at 26 (heightened scrutiny appropriate where "State's self-interest is at stake");[19] *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th

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[19] Although *United States Trust* was decided under the Contracts Clause, it is directly analogous. There, State legislative acts altered contractual obligations of the State to private parties. Here, a State court decision made new law altering contractual obligations of the State to private parties.

Cir. 1992) (*United States Trust* applicable under due process analysis).

This case raises important questions about the application of such scrutiny here. The first question is whether heightened scrutiny is available where the State is overseeing not its own direct financial interests, but rather those of a municipal entity within the State. While *United States Trust* does not directly answer this question, it does suggest that heightened scrutiny is applicable to the interests of municipalities before state decision-makers. The *United States Trust* Court, in discussing the applicable standards, cited with favor a number of cases in which the Court struck down State action affecting municipal obligations as violating the Contracts Clause. *See United States Trust*, 431 U.S. at 24-25 n.22, citing, *e.g.*, *W.B. Worthen v. Kavanaugh*, 295 U.S. 56 (1935); *Louisiana v. Pilsbury*, 105 U.S. 278 (1882). That this Court has invalidated so many actions where states affected municipal obligations is telling, especially when occurring under a constitutional provision under which challenges are seldom successful. The *United States Trust* Court further noted that it had upheld State action in only one such case, and, that the State had acted there to assist the private bondholders rather than the municipality. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942). Thus, the Court has apparently applied some heightened scrutiny in such instances. That the Court would apply heightened scrutiny in these cases is not surprising given the historically close relationship between states and their municipalities. *See Bain v. City of Springfield*, 424 Mass. 758, 768 (1997) ("It is well settled that a municipality is a creature of the state legislature for the exercise of powers as the state sees fit. . .") (citations omitted).

The second significant question this case presents for a heightened scrutiny analysis is whether it matters that the challenged action was taken by the judiciary. While the judiciary is generally thought more insulated from the vagaries of politics than the legislative and executive branches, *United States Trust* makes no express distinction among branches of government and speaks only of the state generally. Similarly, in *Hughes*, Justice Stewart's concurrence, concluding that the Washington Supreme Court's change of position constituted a "taking," did not speak in terms of heightened scrutiny, but did argue that where the decision was unprecedented and operated to the direct benefit of the government, it was not entitled to deference - even though it was a decision of the State's highest court, interpreting that State's law. *See Reynolds*, 640 F.2d at 705 (suggesting where a State court judgment operates to transfer property to the State, a due process violation is more likely). Therefore, heightened scrutiny should also apply to judicial action where a state's self-interest is at issue.

3. *The SJC's Decision Was Arbitrary and Capricious*

Even under a more exacting degree of scrutiny, violation of the due process standard is generally difficult to establish. *Wood v. Conneaut Lake Park, Inc.*, 386 F.2d 121, 124-25, (3d Cir. 1967). Mere error of State law does not constitute a constitutional violation. The decision must be "so certainly unfounded that it properly may be regarded as essentially arbitrary..." *Duane v. Merchants Legal Stamp*

Co., 231 Mass. 113, 126 (1918), quoting *Leathe v. Thomas*, 207 U.S. 93, 99 (1907).[20]

This petition has argued that the SJC's decision broke sharply with its own past precedents and that the changes unfairly took LPA's property. The earlier discussion of the retroactive application of new rules is equally relevant to the due process analysis. *See Eastern Enterprises*, 118 S.Ct. at 1258 (Kennedy, J. concurring). Though most objections to retroactivity refer to legislation, for the reasons set forth *supra* at 20-22, those same principles should apply with equal force to retroactive changes in the common law, where such changes represent a sharp break with established precedent and government is the direct beneficiary. As argued above, the SJC had no justification to apply its new rules retroactively, other than to benefit the City. *Supra* at 23-24.

Though this Court generally eschews reviewing cases simply on the basis of errors in fact finding and misapplications of State law, this appeal would help define the extent to which review is available where State courts render unprincipled and arbitrary decisions where the State's own self-interest is at stake. This Court has never articulated the due process bounds beyond which a State court may not go in reviewing civil judgments concerning its own subdivisions. This case presents an opportunity finally to do so.

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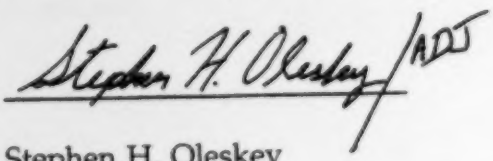
[20] A useful window into the overall attitude of the SJC in addressing LPA's claims may be found in a portion of its decision where it held that the City and BRA could not be liable under M.G.L. c. 93A, the State's unfair or deceptive trade practices provision. "It is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislative ends." *Lafayette Place*, 427 Mass. at 535.

CONCLUSION

The SJC has unfairly and unjustly applied new common law rules retroactively to LPA and thereby caused a transfer of all LPA's valuable vested contract rights to the government. The Court should determine, as it has never done, whether the Takings and Due Process Clauses of the Constitution protect private parties from such action. The Court should therefore grant a writ of certiorari.

Respectfully submitted,



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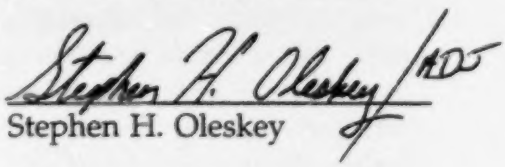
November 25, 1998

CERTIFICATE OF SERVICE

Stephen H. Oleskey hereby certifies under the pains and penalties of perjury that he caused a true copy of the Lafayette Place Associates Petition for Writ of Certiorari to be served on November 25, 1998 by hand upon Rory Fitzpatrick, Esq., Kirkpatrick & Lockhart LLP, One International Place, Boston, MA 02110-2637, special counsel for the City of Boston.



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